STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	:	
	:	
Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service. (Tariffs filed April 21, 2000)	:	**Docket No. 00-0393**

REPLY BRIEF ON REOPENING OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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The Staff of the Illinois Commerce Commission (the "Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Brief on Reopening in the above-captioned matter.

Staff's Response to the CLECs

The CLECs[1] first argue that, inasmuch as the Commission's *Project Pronto Orders*[2] were initiated under, decided under, and are supported by, state law, the changes in federal law resulting from the Triennial Review Order are irrelevant. CLEC Comments at 4, *et seq*. They further contend that this Commission has often required SBC to offer unbundled access to network

[1] AT&T Communications of Illinois, Inc.; Covad Communications Company; and WorldCom Inc., d/b/a MCI Communications Corporation

[2] See *Order*, Illinois Bell Telephone Company: Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, ICC Docket No. 00-0393 (March 14, 2001) (hereafter "First Project Pronto Sharing Order"); *Order on Rehearing*, Illinois Bell Telephone Company: Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, ICC Docket No. 00-0393 (September 26, 2001) (hereafter "Project Pronto Order on Rehearing")

elements that the FCC has not required ILECs to unbundle. Id. at 7, *et seq*. In support of this proposition, the CLECs point to the *Merger Order*,[3] and the *Wholesale Order*.[4] Id. at 7-8.

The CLECs next contend that the federal Telecommunications Act of 1996 specifically preserves, and does not preempt, independent state law authority, as relied upon by the Commission, to impose additional unbundling requirements. CLEC Comments at 8, *et seq*. They likewise claim that the *Triennial Review Order* does not preempt independent state authority, Id. at 10-11, and essentially urge the Commission to disregard it. *See* Id. at 11 (CLECs urge the Commission not to "place unwarranted stock" in the *Triennial Review Order*"). The CLECs further allege that the Commission's state law authority is preserved to the extent that it does not substantially prevent implementation of Section 251 of the federal Act, Id. at 11-13; and they claim the Commission's *Project Pronto Orders* do not substantially prevent such implementation. Id. They rely heavily on the proposition that the FCC, although aware of state requirements directing the unbundling of the HFPL, did not, in the *Triennial Review Order*, specifically preempt those requirements. Id. at 14-15. The CLECs contend that state unbundling requirements do not affect the ability of new entrants to obtain services, which they assert is the proper standard to use when determining

[3] *Order*, Joint Application of SBC and Ameritech, ICC Docket No. 98-0555 (September 23, 1999) (hereafter "Merger Order")

[4] *Order*, AT&T Communications of Illinois, Inc: Petition for a total local exchange wholesale service tariff from Illinois Bell Telephone Company d/b/a Ameritech Illinois and Central Telephone Company pursuant to Section 13-505.5 of the Illinois Public Utilities Act. ICC Docket Nos. 95-0458/0531 (Consol.) (June 26, 1996)(hereafter "Wholesale Order")

whether a state requirement substantially impairs implementation of the federal scheme. Id. at 16.

Next, the CLECs invoke Section 706 of the federal Act, claiming that Section 706,[5] which it claims the FCC invoked to forbear from regulation of hybrid loops, supports the Commission's decision to require their unbundling. CLEC Comments at 18 *et seq*. The CLEC contend that Section 706 just as easily supports this Commission's decision to order SBC to unbundle the Project Pronto architecture, inasmuch as (a) regulatory forbearance is not necessary to induce SBC to deploy the network, or to induce CLECs to deploy advanced services; and (b) CLECs remain impaired without unbundled access to portions of the Project Pronto architecture. Id. at 18-24.

Lastly, the CLECs argue that, notwithstanding the *Triennial Review Order*, SBC is fully subject to unbundling obligations imposed by Section 13-801 of the Public Utilities Act, 220 ILCS 5/13-801, under which the Commission's Project Pronto Orders are fully sustainable. CLEC Comments at 24, *et seq*. The CLEC assert that SBC, having voluntarily elected to be subject to alternative regulation under Section 13-506.1 of the Public Utilities Act, 220 ILCS 5/13-506.1, has therefore voluntarily subjected itself to Section 13-801 requirements, which the CLECs note are more extensive than the FCC requirements and, assert the CLECs, indeed so extensive that they include Project Pronto within their ambit. Id. at 24-29. The CLECs also argue that, in approving SBC's Section 271

[5] Section 706 is a curious statutory creation, not least because of the fact that, although enacted, it has never been codified (i.e., assigned to a title of the United States Code). Accordingly, no further citation to it can be given.

application, the Commission ordered the company to offer the broadband UNE. Id. at 30.

The Triennial Review Order Preempts Portions of the Project Pronto Orders

The CLECs' arguments suffer from one major defect, and numerous minor ones. The major defect is a desire to avoid the Commission's direction in its Order on Reopening in this proceeding. The Commission ordered as follows:

> On August 21, 2003, the Federal Communications Commissions released its Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-0338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order" or "TRO").
>
> In revisiting its existing unbundling rules, the FCC asserted that it had eliminated most unbundling requirements for broadband and made new decisions concerning the unbundling of other network elements that resulted in substantial changes to existing requirements. TRO ¶ 4. The FCC noted that, at least in some instances, existing state requirements will not be consistent with the FCC's new framework and may frustrate its implementation. TRO ¶ 195. Accordingly, the FCC concluded that it would be necessary in such instances for the states to amend their rules and to alter their previous decisions to conform to the FCC's new rules. Id. An overview of the TRO changes to the federal scheme indicates several areas which implicate the need for a reapplication of Illinois and federal law to the issues addressed by this Commission in earlier orders in this docket.
>
> Order on Reopening at 2

After reviewing the relevant *Triennial Review Order* provisions, the Commission determined that:

> In view of the FCC's new rules and their possible preemptive effect on the Commission's previous determinations in this case, the Commission finds it necessary to reopen this case to reconsider the

> Commission's Orders in terms of the TRO and to amend those Orders where required to comport with the terms of the TRO. The Commission has reason to believe that federal law has changed so as to require this case to be reopened. 83 Ill. Admin. Code § 200.900. Accordingly, the Commission determines that this case be reopened to determine whether the Commission's unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law.
>
> Id. at 5

In keeping with these findings, the Commission ordered that:

> [C]hanges in federal law require that, pursuant to 83 Ill. Adm. Code 200.900, the Commission should reopen Docket 00-0393 to determine whether the Commission's unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law.
>
> **...**
>
> [P]ursuant to 83 Ill. Adm. Code 200.900, Docket 00-0393 is reopened to determine whether the Commission's unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law.
>
> Id. at 5-6

In essence, the, the Commission asks the question: "What is the effect of the *Triennial Review Order* on our *Project Pronto Orders*?" To this, the CLECs reply: "None, if one doesn't consider the *Triennial Review Order*." This, while true, is not useful.

A. The TRO Preempts Portions of the Project Pronto Orders

The CLECs' argument, in its broadest sense, is that the *Triennial Review Order* does not affect this Commission's Project Pronto decisions at all, having essentially no preemptive effect. This is not correct, for a number of reasons.

The Staff does not intend to respond in great deal to an argument that, reduced to its essentials, constitutes a rejection of the federal preemption doctrine. However, it is clear the federal courts take preemption somewhat more seriously than the CLECs. As the U.S. Court of Appeals for the Seventh Circuit recently noted:

> The *Federal Telecommunications Act* is explicit that a state commission's regulations concerning interconnection are not preempted "if such regulations are not inconsistent with the provisions of [the Federal Telecommunications Act]." *47 U.S.C. § 261(b)*; *Verizon North, Inc. v. Strand, 309 F.3d 935, 937-44 (6th Cir. 2002)*. But if they are inconsistent, they are preempted. A conflict between state and federal law, **even if it is not over goals but merely over methods of achieving a common goal**, is a clear case for invoking the federal Constitution's *supremacy clause* to resolve the conflict in favor of federal law, see, e.g., *Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 103-04, 120 L. Ed. 2d 73, 112 S. Ct. 2374* and n. 2 (1992)…[.]
>
> Wisconsin Bell Telephone Co. v. Bie, 340 F.3d 441, 444; 2003 U.S. App. LEXIS 16514 (7th Cir. 2003) (emphasis added)

In other words, federal preemption does indeed appear to be an issue here. The FCC has reached the same conclusion, and has done so with a good deal more specificity, stating that:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 *and* do not "substantially prevent" the implementation of the federal regulatory regime. [fn] …[.] Section 251(d)(3) preserves states' authority to impose unbundling obligations but only if their action is consistent with the Act and

does not substantially prevent the implementation of our federal regime. …[.]

We also find that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, is limited by the restraints imposed by subsections 251(d)(3)(B) and (C). …[.] Section 252(e)(3) provides that nothing *in section 252* prohibits a state commission from imposing additional requirements of state law in its review of an interconnection agreement. [fn] We find nothing in the language of section 251(d)(3) to limit its application to state rulemaking actions. **Therefore, we find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation**.

Parties that believe that a particular state unbundling obligation is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission. **If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C).** Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules.

Triennial Review Order, ¶¶193-95 (emphasis added)

The CLECs' view is that state law authority conferred by the Commission under Section 13-505.6, 220 ILCS 5/13-505.6, is unaffected by the Triennial Review Order. However, this argument is not tenable. Section 13-505.6 provides that "[the] Commission **may** require additional unbundling of noncompetitive telecommunications services over which it has jurisdiction based on a determination, after notice and hearing, that additional unbundling is in the public

interest and is consistent with the policy goals and other provisions of this Act[.]" 220 ILCS 5/13-505.6. This is clearly discretionary authority. Moreover, at the time the *Project Pronto Orders* were entered, such discretionary authority could be exercised in a manner fully consistent with federal law, since the FCC's *UNE Remand Order*[6] authorized states to impose unbundling requirements in addition to those required by FCC rules. UNE Remand Order, ¶153 (State public utility commissions may add elements, provided that the unbundling of such elements can be accomplished in compliance with the federal Act). Now, of course, this is not the case, and the FCC's position is that:

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C)[.]
>
> Triennial Review Order, ¶194

The CLECs' contention that the *Triennial Review Order* lacks effect must thereby fail. The FCC did not, as the CLECs correctly point out specifically preempt state HFPL unbundling requirements which exceed federal requirements, but this appears to be because of its view that all state Commission requirements that exceed federal requirements "conflict with and "substantially prevent" implementation of the federal regime[.]" This argument is simply a non-starter.

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[6] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-238 (Nov. 5, 1999) (hereafter "*UNE Remand Order*")

B. The CLECs' Section 706 Arguments Must Fail

The CLECs place a great deal of reliance upon Section 706 of the federal Act. They contend – somewhat disingenuously, as it happens – that the FCC found that CLECs were impaired without access to hybrid loops. CLEC Comments at 17, *citing* Triennial Review Order, ¶286. In fact, the FCC found such impairment to exist only to the extent that the CLECs would be denied a voice-grade transmission path. Triennial Review Order, ¶288. The FCC adopted rules that:

> **do not require** incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information[,] [and further] … **do not require** incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market.
>
> Triennial Review Order, ¶288

In other words, the CLECs' argument that the FCC found impairment is only partially correct, and the part about which they are wrong is the only part that is relevant to this case. The Commission's Project Pronto Orders do not direct SBC to offer unbundled access to a voice-grade transmission path over the Project Pronto architecture; they require SBC to offer unbundled access to an end-to-end HFPL UNE that the CLEC can use to provision packet switching, and that utilizes the full packet switching capabilities of that architecture. The CLECs' Section 706 arguments, based as they are on the incorrect premise that the FCC found no impairment with respect to the HFPL / packet switching capabilities of hybrid loops, must fail.

C. Section 13-801 Need Not Be Considered At This Point

Next, the CLECs argue that Section 13-801 of the Public Utilities Act requires SBC to unbundled its Project Pronto architecture. The Staff is in general concurrence with the CLECs' analysis of the general applicability, if not the actual application, of Section 13-801. However, the question here is not whether the Commission could have relied on Section 13-801 in its Project Pronto Orders; the question is, instead, whether the Commission did rely on Section 13-801 in its Project Pronto Orders. The answer to this question is, as the Staff demonstrated in its Initial Brief, *see* Staff IB at 28 *et seq*., that the Commission did not. The Commission could have ordered SBC to offer unbundled access to Project Pronto, and can, in the Staff's view, subsequently do so if it deems it proper. However, it did not do so in its Project Pronto Orders. Thus, the CLECs' Section 13-801 arguments ultimately fail.

Finally, the CLECs argue that the Commission's *Section 271 Order* requires SBC to offer unbundled access to Project Pronto. However, the portion of the Commission's Order upon which the CLECs rely has only to do with the question of interim rates. CLEC Comments at 30. The 271 Order does not specifically order unbundling, but rather determines that the rates set for Project Pronto are in fact satisfactory – from a TELRIC standard – for Section 271 purposes. The CLECs cannot rely on the Section 271 Order for this purpose.

Staff Response to SBC

SBC, in its Comments, seeks the following Commission actions:

(i) removal of any requirement that the Pronto DSL architecture be unbundled;

(ii) acknowledgment that the HFPL need not be unbundled or provided to CLECs, except as specified by the TRO;

(iii) establishment of a recurring price for the HFPL for the grandfathered end-users;

(iv) vacating of the HFPL provisioning intervals;

(v) authorization for SBC to withdraw the tariffs that implemented the Pronto and HFPL unbundling requirements;

(vi) vacating of the pricing for manual loop qualification; and

(vii) vacating of the calculation of loop conditioning charges.

Staff has addressed each of these issues in its Initial Brief, except for items (iv) and (v), and responds herein to SBC's arguments in more detail.

The Commission reopened this docket to consider the Triennial Review Order's impact on the Commission's Project Pronto Orders.[7] SBC's arguments fail with respect to actions (iii), (iv), (vi) and (vii), because SBC does not identify a change in federal law resulting from the Triennial Review Order that impacts the

[7] In view of the FCC's new rules and their possible preemptive effect on the Commission's previous determinations in this case, the Commission finds it necessary to reopen this case *to reconsider the Commission's Orders in terms of the TRO* and to amend those Orders where required to comport with the terms of the TRO. The Commission has reason to believe that federal law has changed so as to require this case to be reopened. 83 Ill. Admin. Code § 200.900. Accordingly, the Commission determines that this case be reopened to determine whether the Commission's unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law. Initiating Order on Reopening at 5-6 (emphasis added).

Commission's decision on those issues. Most arguments raised by SBC were issues in its appeal of the Commission Project Pronto Orders to the federal courts. To the extent the Triennial Review Order does not amend federal law relied upon by the Commission in the Commission Orders, the Commission's orders still remain valid, need not be reviewed in this proceeding. Further, the issues are more properly addressed by SBC in its arguments before the Seventh Circuit. Staff agrees with SBC regarding action items (i) and (ii), to the extent that the Commission Orders relied upon federal law that was indeed modified in the Triennial Review Order. Finally, SBC has tariffs on file with the Commission that describe its Project Pronto and HFPL offerings. The Wisconsin Bell v. Bie decision has no impact on those tariffs; however, if the Commission determines in the course of this proceeding that SBC's Project Pronto and HFPL offerings should be modified, then its tariffs will need to be modified.

A. Project Pronto and HFPL

SBC argues that, in light of the Triennial Review Order, the Pronto DSL architecture "'must not' be required to be unbundled", SBC Comments at 10, and that "ILECs cannot be required to make the HFPL available as a UNE in any market" except as provided in the FCC's transitional condition. Id. at 13. Staff agrees that federal law no longer requires Project Pronto and HFPL be offered as unbundled network elements. Given that the Triennial Review Order modifies the underlying federal law that the Commission relied upon in deciding to require said elements to be unbundled, Staff agrees that SBC cannot be required to

provide them under the Project Pronto orders. *See* Staff IB at 18-21, for discussion of Effect of TRO on Commission Orders with respect to HFPL, Lit Fiber Loops / Copper subloops and ADLU Line Cards.

Staff, however, disagrees with SBC's implication that the Commission cannot under state law, require SBC to offer unbundled access to Project Pronto or HFPL. SBC, without justification, asserts that states do not have the authority to require an ILEC to unbundle Project Pronto or HFPL. Although not at issue in this proceeding, for the reasons stated in Staff's Initial Brief, it is Staff's view that Section 13-801 does grant the Commission authority to require SBC to offer both, if requested by a CLEC. *See* Staff IB at 30.

B. HFPL Price for "Grandfathered End-Users"

SBC proposes that the Commission change its prior ruling regarding $0 monthly recurring price for HFPL service provided prior to the effective date of the *Triennial Review Order*. SBC Comments at 14-17. This is not an issue properly within the scope of this proceeding. SBC's proposal fails to identify a change in law resulting from the Triennial Review Order that in any way calls into question the Commission's determination that the loop conditioning charge for HFPL should be $0.

The Triennial Review Order modified federal law such that HFPL no longer needs to be provided as a UNE three years after the effective date of the Triennial Review Order. 47 C.F.R. §51.319(a)(1)(B). In the meantime, however, ILECs are required to provide HFPL service to carriers who request service

either within one year of the effective date of the Triennial Review Order, ("new customers") or who already had service prior to the effective date of the Triennial Review Order (i.e. "grandfathered end-users"). Id. During that time, ILECs are required to provide HFPL service at a percentage of the "state-approved monthly recurring rate." Id. at (B)(1-3). This requires ILECs "to charge competitive LECs the same price for access to the HFPL for to the grandfathered end-users at the same rate that the incumbent LEC charged for such access prior to the effective date of the Commission's Triennial Review Order." Id. at (A); Triennial Review Order, ¶264. The current $0 rate for HFPL is the Commission-approved rate and is TELRIC-based, and is in compliance with federal law and therefore does not need to be changed.

In addition, the FCC intends to review TELRIC in the near future, as acknowledged in the Triennial Review Order. *See* Triennial Review Order, ¶676. In the Triennial Review Order, the FCC stated: "[W]e find that issues related to modification of our TELRIC pricing framework are best addressed in a future proceeding dedicated to that topic." Id. That review is not yet complete. Therefore, absent a change in TELRIC rules, the current rates set by the Commission in its orders are still TELRIC compliant. Since the current pricing is in compliance with TELRIC, this issue in not ripe.

C. HFPL Provisioning Intervals

SBC argues that the provisioning intervals for HFPL must be revised or vacated. SBC Comments at 17-18. This argument is untenable, because the

Triennial Review Order did not amend the federal law the Commission's Project Pronto Orders relied upon in setting those intervals.

In the Commission's First Project Pronto Order, the Commission required SBC to provision line sharing[8] within twenty-four hours for loops not requiring conditioning, and three days for loops requiring conditioning.[9] First Project Pronto Order (Line Sharing Order) at 73. The Triennial Review Order modified federal law such that the HFPL no longer needs to be provided as a UNE three years after the effective date of the *Triennial Review Order*. 47 C.F.R. §51.319(a)(1)(B). SBC argues that the Triennial Review Order determines the "full extent of its HFPL-related obligations," and that the Commission ignored the parity requirement of the FCC's *Line Sharing Order*[10] in setting the intervals. SBC Comments at 17-18.

This is not an issue that should be addressed in this proceeding since the Commission set the intervals based on the FCC's *Line Sharing Order*, and the Triennial Review Order does not amend the standard relied upon in setting those intervals. The Commission, in the First Project Pronto Order, accepted the CLEC's / Intervenor's proposal, which was the Commission's finding in its Order in Docket No. 00-0312/00-0313 (Covad / Rhythms arbitration). First Project

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[8] Line sharing is the process by which a requesting carrier provides digital subscriber line service over the same copper loop that the ILEC uses to provide voice service, with the ILEC using the low frequency portion and the requesting carrier using the HFPL. 47 C.F.R. §51.319(a)(1)(i).

[9] The First Project Pronto Order decided that line sharing provisioning intervals would be phased-in over time, with the interval decreasing at each interval. The one day and three day intervals are the current intervals, and the Commission required them to be effective as of December 7, 2000.

[10] Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order In CC Docket No. 98-147 and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Fourth Report and Order In CC Docket No. 96-98, 14 F.C.C. Rcd. 20912 (1999).

Pronto Order at 73. In the Covad / Rhythms Arbitration Order, the Commission relied upon the FCC's *Line Sharing Order* in making its decisions. *See* Order, Covad / Rhythms Arbitration, 2000 Ill. PUC LEXIS 660 at 5-6, 559-63. Since the Triennial Review Order did not specifically amend the parity requirement, the basis for the decision is not brought into question by the Triennial Review Order. Therefore, this is not an issue to be addressed in this proceeding.

D. Pronto and HFPL Tariffs

SBC proposes that the Commission vacate its requirement that SBC tariff its Pronto DSL architecture and its HFPL. SBC Comments at 21-22. This proposal should be rejected since SBC is still required to provide HFPL for three more years. See 47 C.F.R. §51.319 (a)(1)(i) (A – B). Therefore, it is clear that tariffs should remain in effect; however, the tariff language will need to be revised in accordance with the decision in this proceeding.

Furthermore, SBC incorrectly applies the *Wisconsin Bell v. Bie* decision to the tariffs in this matter.

SBC argues that there is no legal basis for requiring SBC to file or maintain a tariff based on the Seventh Circuit's *Bie* decision. SBC Comments at 22. *Bie* does not stand for the proposition that all tariffing requirements addressing interconnection, UNEs and resale are prohibited by the 1996 Act. Rather, *Bie* holds that state tariffing requirements are inconsistent with the 1996 Act to the extent that they require an ILEC to offer an alternative means of obtaining interconnection rights without an interconnection agreement. It is

Staff's legal position that the tariff filing made by SBC pursuant to the Commission Orders, as well as the Commission's ability to review that filing and order such tariff revisions as it deems appropriate under applicable state and federal law, are permitted under *Bie* (notwithstanding that those tariffs purport to offer interconnection and UNEs without an interconnection agreement) because this docket was commenced upon a voluntary tariff filing by SBC.

1. Review of *Bie* Opinion

In *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 2003 U.S. App. Lexis 16514 (7th Cir. 2003) the Seventh Circuit affirmed the district court's ruling that a Wisconsin commission order requiring Wisconsin Bell to file tariffs containing the price and other terms on which competing carriers would be entitled to interconnect and obtain unbundled network elements ("UNEs") was barred by the 1996 Act. The issue on appeal was "whether a state could create an alternative method by which a competitor could obtain interconnection rights." *Id*. at 442. The court explained that "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law . . . ." *Id*. at 443, citing *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103-04, 120 L. Ed. 2d 73, 112 S. Ct. 2374 and n. 2 (1992)-

The court affirmed the district courts holding that the Wisconsin commission's tariffing requirement was preempted, citing to Verizon North, Inc. v. Strand, 309 F.3d 935, 941 (6th Cir. 2002), MCI Telecommunications Corp. v.

GTE Northwest, Inc., 41 F. Supp. 2d 1157, 1178 (D. Ore. 1999); and Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc., 323 F.3d 348, 358-60 (6th Cir. 2003). *Bie* at 444. It was the opinion of the *Bie* court that establishing an alternative means of interconnection by requiring an ILEC to offer interconnection through tariffs "*has* to interfere with the procedures established by the federal act [because it] . . . places a thumb on the negotiating scales by requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there. " *Id*. (emphasis added).[11] The court also opined that the tariffing process "allows the other party to challenge the reservation price, and try to get it lowered, by challenging the tariff before the state regulatory commission, with further appeal possible to a state court--even though Congress, in setting up the negotiation procedure, explicitly excluded the state courts from getting involved in it." *Id*.

The court also rejected the view that these were meaningless distinctions that should not give rise to preemption. First, the court found that although both the state process (tariffing) and the federal process (negotiation/arbitration/agreement) would be based on the same pricing standards, "[a]n appeal from the commission's resolution of an entrant's challenge to a tariff would go to a state court, rather than a federal court, a

[11] Circuit Judge Cudahy issued a dissenting opinion in which he disagreed with the majority's conclusion "that requiring an incumbent carrier to offer by tariff the same network elements available by negotiated and arbitrated interconnection agreements is 'inconsistent' with the 'provisions' of the Act." *Id*. at 446. Staff's analysis and arguments in this brief are based on the majority's analysis as the currently controlling law. It is Staff's understanding that the United States Supreme Court denied a petition for certiorari in the Bie case on January 12, 2004.

difference that cannot be assumed to be inconsequential." *Id*. at 445. Second, the court reasoned that one cannot assume a similarity in results between the state tariff process and the federal negotiation process, observing that if the results of negotiation were preordained "the federal law would not have made recourse to the commission a last resort if negotiations fail." *Id*. In this regard, the court found that "[t]he tariff procedure short-circuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement." *Id*. citing 47 U.S.C. § 253(b)(1). Finally, the court found arguments that "the state's tariff requirement promotes the procompetitive policy of the federal act" to be unpersuasive. *Id*. The court reasoned that "[t]he negotiation procedure established by the federal act provides the local phone company with a degree of protection that it would lack if the state commission could, by requiring the company to file a tariff that the commission might invalidate as unreasonable, enable would-be entrants to bypass the federally ordained procedure." *Id*. (emphasis added).

2. Analysis of the *Bie* Opinion and Application to the Instant Case

The tariff filing made by SBC in this proceeding, as well as the Commission's ability to review that filing and order such tariff revisions as it deems appropriate under applicable state and federal law, are permitted under *Bie*. *Bie* does not stand for the proposition that all tariffing requirements

addressing interconnection, UNEs and resale are prohibited by the 1996 Act.[12] Rather, the holding in *Bie*, as explained by the foregoing analysis, is that state tariffing requirements are inconsistent with the 1996 Act to the extent that they require an ILEC to offer an alternative means of obtaining interconnection rights without an interconnection agreement that bypasses the federal process.[13]

This proposition is not by any means a new or novel one. Indeed, the cases cited and relied upon by the Seventh Circuit were decided on that very basis. In *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002), the Michigan commission required incumbent LECs "to file tariffs offering its network elements and services for sale on fixed terms to all potential entrants without the necessity of negotiating an interconnection agreement." Id. at 939 (emphasis in original). As a result, CLECs were permitted to purchase items "directly off of the tariff menu" without the need to negotiate or arbitrate an agreement. Id. at 939-40. Similarly, in *MCI Telecomm. Corp. v. GTE Northwest, Inc.*, 41 F. Supp.2d 1157 (D. Or. 1999), the court held that "the challenged tariff is preempted by the Act, to the extent GTE is required to sell unbundled elements of finished services to a CLEC that had not first entered into an interconnection agreement with GTE

[12] The *Bie* court specifically acknowledged that state "regulations concerning interconnection are not preempted 'if such regulations are not inconsistent with the provisions of [the Federal Telecommunications Act].'" *Bie* at 443 (brackets in original), citing *47 U.S.C. § 261(b)* and quoting *Verizon North, Inc. v. Strand, 309 F.3d 935, 937-44 (6th Cir. 2002)*."

[13] This reading of *Bie* is also supported by the district court's analysis of the issue presented in the order upheld by the *Bie* court. The district court in Bie held the tariff requirement unlawful because the Wisconsin commission "impose[d] a tariff that an entrant may select in lieu of negotiating an interconnection agreement." *Wis. Bell v. Bie, 2002 U.S. Dist. LEXIS 26901 at 2 (W.D. Wis., Sept. 26, 2002)*. The district court expressly identified the issue as "whether it is permissible in light of § 252 to force the incumbent to issue a tariff that an entrant can select unilaterally without negotiating an agreement." Id. at 18-19. Likewise, the Seventh Circuit decision, in affirming the district court, is premised on the notion that the Wisconsin commission required Wisconsin Bell to file a tariff in which carriers can purchase services in lieu of negotiating interconnection agreements. Bie, 340 F.3d at 442-45.

pursuant to the Act."[14] Id. at 1178 (emphasis added). Accordingly, the cases cited and relied upon in *Bie* provide further confirmation of the scope of the court's holding.

Thus, the concern identified by the Seventh Circuit in *Bie* and the basis for preempting the Wisconsin tariffing requirement was that Wisconsin required the ILEC to permit CLECs to bypass the federal negotiation process and obtain services from a tariff without having to negotiate an interconnection agreement.[15] Accordingly, *Bie* did not hold that all state tariffing requirements are preempted. See Michigan Bell Tel. Co. v. MCIMetro Access Transmission Serv., Inc., 323 F.3d 348, 358-60 (6th Cir. 2003); U S West Communications, Inc. v. Sprint Communications Co., 275 F.3d 1241, 1249-53 (10th Cir. 2002); Michigan Bell Tel. Co. v. Strand, 26 F.Supp.2d 993, 1000-01 (W.D. Mich. 1998); see also Virginia Arbitration Order[16] ¶ 602 n.2001 ("We expect that whether a party may

[14] Additionally, by using the "but cf." signal, rather than the "contra" signal, in citing to Michigan Bell Tel. Co. v. MCIMetro Access Transmission Serv., Inc., 323 F.3d 348 (6th Cir. 2003), the panel majority implicitly acknowledged that it was not holding that all state tariffing requirements are preempted by the Act. In Michigan Bell, the Sixth Circuit held that "[u]nder the system of cooperative federalism established by the Act, it is permissible for Michigan to maintain a tariff system alongside the agreements negotiated under the Act." Presumably, if Judge Posner had intended to indicate that the panel majority in *Bie* had preempted all state tariffing requirements, he would have used the "contra" signal to indicate that Michigan Bell "directly states the contrary of the proposition." See The Bluebook, A Uniform System of Citation § 1.2, at 23 (15th ed. 1991) (explaining difference between "contra" and "but cf." signals); Hsue Li Lee v. Reno, 15 F. Supp.2d 26, 47 (D. D.C. 1998) (discussing "cf." signal).

[15] Staff notes that the Commission itself has taken a similar position on the meaning of *Bie* in federal court. See Supplemental Brief of the Commissioners of the Illinois Commerce Commission, *Illinois Bell Tel. Co. v. Wright*, No. 02 C 6700 (N.D. Ill. filed Sep. 19, 2002) (brief filed on November 14, 2003); Supplemental Opening Brief of the Commissioners of the Illinois Commerce Commission, *Illinois Bell Tel. Co. v. Wright*, No. 02 C 4121 (N.D. Ill. filed June 7, 2002) (brief filed on October 24, 2003); Supplemental Reply Brief of the Commissioners of the Illinois Commerce Commission, *Illinois Bell Tel. Co. v. Wright*, No. 02 C 4121 (N.D. Ill. filed June 7, 2002) (brief filed on October 31, 2003).

[16] *In re* Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes With Verizon Virginia, Inc. and for Expedited Arbitration, CC Docket No. 00-00218, DA 02-1731 (rel. July 17, 2002) ("*Virginia Arbitration Order*")

purchase a service out of a tariff when it is also offered in the interconnection agreement would depend on the language of the agreement.").[17]

3. Voluntary Tariff Filings

The facts in *Bie* presented a mandatory tariffing requirement to establish an alternative to the federal negotiation, arbitration and approval process. There is no indication in *Bie* that the court's ruling must, should or could extend beyond the facts presented. As explained above, the basis of the preemption upheld in *Bie* was the imposition of a mandatory requirement allowing CLECs to bypass the federal process by obtaining interconnection without an interconnection agreement. A key component of the court's reasoning was that the mandatory tariff filing would deprive the ILEC of the protections afforded by the 1996 Act by allowing competitors to "bypass" the federal process. *Bie* at 445. To the extent that an ILEC voluntarily chooses to file a state tariff offering interconnection, UNEs or resale without an interconnection agreement, it has not been deprived of the 1996 Act's protections. Rather, in voluntarily filing a tariff and asking the Commission to approve the prices and other terms contained in such tariff, an ILEC has chosen to forego such protections. Accordingly, the Commission is not prohibited under *Bie* from ordering tariff revisions in response to voluntary tariff filings.

[17] If the panel had held that all state tariffing requirements were preempted, that holding would have created a split between circuits. *See Michigan Bell*, 323 F.3d at 358-60; *U S West Communications, Inc. v. Sprint Communications Co.*, 275 F.3d 1241, 1249-53 (10th Cir. 2002). In that regard, the panel was required under Rule 40(e) to circulate its opinion to the judges of the court in regular active service in advance of publication, and include a footnote in the opinion noting compliance with the Rule. Fed. R. App. P. 40(e). *See Samirah v. O'Connell*, 335 F.3d 545, 550 n. 6 (7th Cir. 2003). There is no indication in the panel's opinion that a proposed opinion was circulated among the active judges prior to issuance as required by Circuit Rule 40(e). Accordingly, Bie did not preempt all state tariffing requirements.

In the instant case, SBC made what appears by all accounts to be a voluntary tariff filing, which was then approved on an interim basis pursuant to Section 13-501(b) of the PUA. The *Bie* case neither precludes SBC from voluntarily filing a tariff to implement such an offering, nor prevents the Commission from reviewing that tariff or impose an interim tariff. Thus, it is clear that SBC needs to maintain tariffs on file, and in effect, with the Commission. The tariff language, however, would need to be revised in accordance with the decision coming out of this proceeding.

E. Loop Conditioning

SBC proposes that the Commission vacate its prior ruling regarding loop conditioning because it does not comply with federal law. SBC Comments at 18-20. SBC's proposal fails because it does not identify an issue within the scope of this proceeding. In its comments, SBC fails to identify a change in the *Triennial Review Order* that undermines the reasoning of the Commission's determination that the loop conditioning charge for HFPL should be $0. In addition, it is premature to remove it from tariffs, because the *Triennial Review Order* requires ILECs to offer HFPL to carriers for one more year. Based on that federal requirement, loop conditioning will still need to occur.

The Triennial Review Order modified federal law such that HFPL no longer needs to be provided as a UNE three years after the effective date of the Triennial Review Order. 47 C.F.R. §51.319(a)(1)(B). For three years after the effective date of the Triennial Review Order, the FCC has required ILECs to provide a HFPL to new customers at a percentage of the "state-approved

monthly recurring rate." Id. at (B) 1 – 3.

Due to changes in federal law, set forth in the Triennial Review Order, the Commission reopened this docket to consider the Triennial Review Order impact on the Commission's Orders.[18] None of SBC's arguments for revising the loop conditioning requirements identify a change in federal law, as a result of the TRO, that brings the those requirements in to question.

With respect to loop conditioning, the FCC found that:

> **[W]e conclude that incumbent LECs must provide access, on an unbundled basis, to xDSL-capable stand-alone copper loops because competitive LECs are impaired without such loops. [fn] Such access may require incumbent LECs to condition the local loop for the provision of xDSL-capable services.**
>
> Triennial Review Order, ¶642 (footnotes omitted)

Thus, ILECs must continue to offer loop conditioning at TELRIC rates. This is precisely what the Commission ordered in the *First Project Pronto Order*. First Project Pronto Order at 83. It rejected excessive, non-forward looking rates proposed by SBC, while recognizing that SBC was entitled to some recovery for this activity. Id. Accordingly, there is no reason for the Commission to reconsider this aspect of its *Original Order*.

SBC alleges that the loop conditioning charge approved by the Commission in its *First Project Pronto* Order fails to comply with federal law

[18] In view of the FCC's new rules and their possible preemptive effect on the Commission's previous determinations in this case, the Commission finds it necessary to reopen this case *to reconsider the Commission's Orders in terms of the TRO* and to amend those Orders where required to comport with the terms of the TRO. The Commission has reason to believe that federal law has changed so as to require this case to be reopened. 83 Ill. Admin. Code § 200.900. Accordingly, the Commission determines that this case be reopened to determine whether the Commission's unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law. Initiating Order on Reopening at 5-6 (emphasis added).

because HFPL is not a UNE. SBC Comments at 19. Beyond that, SBC argues that the loop conditioning rates are not compliant with paragraphs 382 and 682 of the FCC's *First Report and Order*,[19] and paragraphs 192 and 193 of the FCC's *UNE Remand Order*. Both FCC orders were in effect at the time the *First Project Pronto* Order was drafted and were considered by the Commission. First Project Pronto Order at 2-3. Moreover, none of the requirements cited by SBC in its Comments were revised by the *Triennial Review Order*. SBC argues that the *UNE Remand Order* was readopted in the Triennial Review Order, however the *Triennial Review Order* did not amend that FCC order.

If the federal law that the Commission relied upon in the *First Project Pronto Order* was not changed as a result of the TRO, then there is no basis for the Commission to revisit that decision. In addition, such an issue is outside the scope of this hearing, because the hearing is limited to issues caused by new requirements set forth in the TRO. *See* Initiating Order on Reopening at 5-6.

F. Manual Loop Qualification

SBC requests that the $0 rate for manual loop qualification be vacated. SBC Comments at 3. SBC's request should be denied since this claim also is outside the scope of this proceeding.

SBC argues that the Commission misapplied the *UNE Remand Order*. SBC Comments at 21. SBC's claim must fail since the First Project Pronto Order considered the *UNE Remand Order* in setting a manual loop qualification rate.

[19] First Report and Order, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C. Rcd. 15499 (1996)

First Project Pronto Order at 2-3. Moreover, SBC cites no change in the underlying federal law as a result of the Triennial Review Order that the Commission relied upon in setting the charges. If the federal law that the Commission relied upon in the *First Project Pronto Order* was not changed as a result of the Triennial Review Order, then there is no basis for the Commission to revisit that decision. In addition, such an issue is outside the scope of this hearing, because the hearing is limited to issues caused by new requirements set forth in the Triennial Review Order. *See* Initiating Order on Reopening at 5-6.

Conclusion

Neither the CLECs or SBC have raised arguments in their Comments that should deter the Commission from adopting the Staff's recommendations in their entirety.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully Submitted,

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